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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1034

FREDERICK KILLE,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON APPEAL FROM THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATE OF MARYLAND,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY COMMENTS

This Brief is in Opposition to Petition for Writ of Certiorari filed pursuant to the request of this Honorable Court.

OPINION BELOW

In *Kille v. State*, No. 755, September Term, 1972, the Court of Special Appeals of Maryland in an unreported *per curiam* decision filed August 1, 1973, affirmed the Petitioner's conviction for possession of marihuana which was entered in the Circuit Court for Cecil County, the Honorable J. Albert Roney, Jr., Judge presiding with a jury. The Court of Ap-

peals of Maryland denied a Petition for Writ of Certiorari on October 9, 1973. A copy of the *per curiam* opinion filed by the Court of Special Appeals of Maryland in the premises is attached hereto as Respondent's Appendix A, and a copy of the Court of Appeals of Maryland decision denying a Writ of Certiorari to the Court of Special Appeals of Maryland is attached hereto as Respondent's Appendix B.

JURISDICTION

Petitioner has evoked the jurisdiction of this Honorable Court pursuant to the provisions of Title 28, U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

I. Should the evidence seized have been suppressed as the "fruits" of an unlawful and unreasonable intrusion into the privacy of the Kille home?

II. Should the evidence seized have been suppressed because of the failure of the governmental agent to appraise Kille of the real purpose of his visit and to advise him of his rights, under the Fourth Amendment, to refuse a warrantless seizure in his home?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner alleges that the Fourth Amendment to the Constitution of the United States is involved.

STATEMENT OF FACTS

At the original hearing under a Motion to Suppress the evidence seized held at the first trial of the case, Robert D. Sherman, a Maryland State Trooper, testified that after being called in to investigate a narcotics complaint, he went

to the Four Corners Bar in Elkton, Maryland, on September 19, 1970. At the bar he met George Baluta, the person who had originally given the police the complaint two days prior. Baluta was acquainted with the Appellant and upon Baluta's suggestion Sherman was introduced to the Appellant, another defendant, Robert Raech, and a third person. Sherman was introduced to all the persons and a general conversation began. Sherman was not, however, identified as a Maryland State Trooper but rather was working in an undercover capacity. After Sherman had commented that there was very little to do in Elkton on a Saturday night, Sherman and Baluta were invited to Petitioner's residence. After arriving there, they were admitted by the Petitioner and they went into a kitchen area where the other defendant, Raech, was seated at a table. After refusing a pack of cigarettes, Sherman was offered a pipe filled with a greenish brown substance and after the pipe was lit, Sherman simulated smoking it. The pipe was passed back and forth among the persons in the kitchen. Sherman was able to distinguish the aroma of marihuana. Additionally, he was advised by a co-defendant Raech that there was an unlimited supply of grass available. The Petitioner was present in the kitchen throughout the entire course of the incident. Upon a pre-arranged signal another State Trooper entered the home and the Petitioner and the co-defendant were placed under arrest.

At a subsequent hearing on a Motion to Suppress held on August 31, 1972, the trial court received into evidence the transcript of the first Motion to Suppress, considered it along with the testimony then to be taken.

Robert Raech, a co-defendant, testified at the second hearing and he stated that there was no invitation to Sherman to go to the Petitioner's residence, but that on cross-examination, he admitted stating at a previous trial that,

with regard to the information, "They [Sherman and Baluta] said that if we were going to be home would it be alright for them to come, and we said we didn't care, but we didn't know exactly what time we would be there because we were going to stay at the bar for a while." Raech indicated that when they finally did arrive at the Petitioner's home, they partially expected both Sherman and Baluta to show up. The Petitioner himself stated at the Motion to Suppress that in response to Baluta's request to go to his home that he had said, "Something to the effect that I didn't care, but that we weren't planning to go home then". The Petitioner also indicated that when Baluta and Sherman arrived at the house, he opened the door and Baluta and Sherman walked in and that although he did not invite them in, he did not try to keep them out.

ARGUMENT

I.

THE EVIDENCE SEIZED SHOULD NOT HAVE BEEN SUPPRESSED AS THE "FRUITS" OF AN UNLAWFUL AND UNREASONABLE INTRUSION INTO THE PRIVACY OF THE PETITIONER'S HOME.

In the instant case, the Petitioner filed a Motion to Suppress the Evidence which he claimed was illegally seized from his home. Judge Roney, after hearing testimony subject to the Motion and after also agreeing to consider testimony at a prior Motion to Suppress filed under an earlier trial of the case, concluded in a Memorandum Opinion that Trooper Sherman entered the Petitioner's home as an invitee and a guest. Subsequently, the Court of Special Appeals concluded in its per curiam opinion that:

> "We find nothing in the additional testimony of the appellant or his witness Raech (separately charged and convicted of the same offense) that permits any other conclusion than that the [Petitioner], either directly,

> or by necessary implication, invited Trooper Sherman into his home."

(Appendix A, *infra*).

The Memorandum Opinion of Judge Roney filed on March 4, 1971, is attached herewith as Respondent's Appendix C, and the Memorandum Opinion of Judge Roney filed on September 1, 1972 is attached hereto as Respondent's Appendix D.

In determining whether or not there was a violation of the Petitioner's Fourth Amendment rights as applied to the states through the Fourteenth Amendment, this Court must conduct an independent review of the facts which give rise to the circumstances surrounding the intrusion. *Napue v. People of the State of Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959). A review of the testimony taken at the first Motion to Suppress on March 4, 1971, which resulted in a Memorandum Opinion filed on the same date, and the testimony taken under the subsequent Motion to Suppress on remand on August 31, 1972 resulting in a Memorandum Opinion on September 1, 1972, is sufficient to support the trial court's finding of fact that Trooper Sherman was a guest and invitee on the Kille premises at the time the contraband was seized. It is significant to note that the Court of Special Appeals in the second Kille decision (Appendix A) concluded that:

> "We find nothing in the additional testimony of the appellant or his witness Raech (separately charged and convicted of the same offense) that permits any other conclusion than that the appellant, either directly, or by necessary implication, invited Trooper Sherman into his home."

It should be noted that in the transcript of the second trial on the merits a significant portion of the testimony is directed toward the circumstances surrounding the invitation

and subsequent entrance into the house gained by Trooper Sherman, and while it is submitted, as it has been stated before, that the testimony taken subject to the Motion to Suppress is sufficient to support the trial court's conclusion, a reading of the subsequent testimony as part of the entire record on review clearly establishes the nature of the invitation and the entry on the premises.

Having isolated the facts that are determinative of the case, it is next necessary to establish what standard to apply to the facts in order to determine whether or not Trooper Sherman was properly on the premises.

In this connection it would seem that the recent case of *Schneckloth v. Bustamonte*, ... U.S. ....., 93 S. Ct. 2041 (1973), is determinative of the standards to be applied. *Schneckloth* dealt squarely with the issue of what must be proved to establish that a consent to search under the Fourth Amendment was voluntarily given. After concluding that a search conducted pursuant to a valid consent is constitutionally permissible, citing *Katz v. United States*, 389 U.S. 347 (1967) and *Vale v. Louisiana*, 399 U.S. 30 (1970), the Court concluded that in looking to a discussion of voluntariness, the issue has been most discussed under the determination of the voluntariness of a confession. In rejecting flat statements which afforded definition for voluntariness, the Court cited *Culombe v. Connecticut*, 367 U.S. 568 (1961) when it said:

> "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."

Schneckloth v. Bustamonte, supra, at page 2047. Thus, the Court concluded that in determining whether or not a particular individual's will was overborne, the Court should assess the totality of all the surrounding circumstances together with the characteristics of the accused and the details of any interrogation. The Court pointed out that in all the cases cited dealing with individual factors, the factual circumstance surrounding the confession, an assessment of the psychological impact on an accused, and an evaluation of the legal significance of how the accused reacted was the ultimate determination. Mr. Justice Stewart concluded that with regard to all of the confession cases:

> "The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances. . . . In none of them did the Court rule that the Due Process Clause required the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that were put. While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the 'voluntariness' of an accused's responses, they were not in and of themselves determinative." *Schneckloth, supra,* at p. 2047 (Citations omitted).

Thus, the question of whether or not a search was in fact voluntary or was a product of duress, coercion, impressed or implied, is a question of fact to be determined from a totality of all the circumstances. Significantly, Mr. Justice Stewart further stated:

> "While knowledge of right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the mean-

> ing of a 'voluntary' consent — the legitimate need for such searches and the equally important requirement of assuring the absence of coercion." *Schneckloth, supra,* at 2048.

Going further on the issue, the Court stated that the doctrine established in *Johnson v. Zerbst*, 304 U.S. 458 (1938) had no applicability in the instant case because *Johnson* held that in order to establish a waiver of a constitutional right, the State must establish that the waiver was a result of an intentional relinquishment or abandonment of a known right or privilege. The Court then distinguished the standards in *Johnson v. Zerbst* in that they were held to be in the context of the safeguards of a fair criminal trial. In rejecting *Johnson v. Zerbst*, the Court held that there was nothing which suggested that the *Johnson* standard should be extended to the constitutional guarantee against unreasonable searches and seizures. In doing so, the Court pointed out that the protections of the Fourth Amendment are of a wholly different nature than those governed by *Miranda v. Arizona*, 384 U.S. 436 (1966), having nothing to do with the promoting of the fair ascertainment of truth of a criminal trial. The Court stated that the Fourth Amendment is not an adjunct to the ascertainment of truth, but rather affords standards for protection of quite different constitutional values and thus are distinguishable from the *Miranda* circumstances. In fact, the Court went so far as to say:

> ". . . unlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to be indulged against voluntary relinquishment." Citing *Coolidge v. New Hampshire*, 403 U.S. 443.

In this connection, compare *Boykin v. Alabama*, 395 U.S. 238 (1969), as to standards for gauging intelligent waiver and the lack of a requirement therein as to showing a waiver

of right to raise Fourth Amendment objections as a condition of accepting a guilty plea.

Quite clearly under the instant circumstances as applied to the reasoning in *Schneckloth*, it can be seen that the Petitioner, Frederick Kille, consented under the circumstances to allow Trooper Sherman to enter his house for the purposes, apparently, of consuming marihuana. Clearly the Petitioner had no objection to Trooper Sherman observing the marihuana since in fact he was permitted to join in the smoking of marihuana in the kitchen as the pipe was passed from person to person. Thus, Kille's misplaced reliance on Trooper Sherman has no effect in the instant case since it was Sherman who was permitted to enter without any further inquiry into his background. Had Kille been so concerned with police officers entering his house and discovering his marihuana, then he should have inquired further into Trooper Sherman's credentials and identity then he did. Once again, perhaps a significant aspect of this particular case is established, not by the testimony which indicated the initial invitation of Trooper Sherman into the premises, but by the subsequent acts of the parties in Kille's residence once Trooper Sherman was in there, that is, the passing around of the pipe and the display of the marihuana. Clearly, if Kille did not want Sherman on his premises, his acts once Sherman was there were clearly inconsistent with the voluntary nature of the invitation and the subsequent acquiescence to his presence. When these facts are viewed in this light, it is submitted that this Court can conclude under *Schneckloth* that Kille had voluntarily consented, under all the circumstances, to Sherman's presence in his house and took him for what he was, *an unknown person with a very scimpy credentials*, and so risked the disclosure of possession of marihuana by so admitting a person who was not clearly identified to him, if his testimony is to be

believed at all. Taking it in this light, Kille's testimony weighs heavily against himself because it establishes that with little or no inquiry into Sherman's identity, he nonetheless allowed him (Sherman) to enter his house and he should not now be heard to complain if the sanctity of his home means so much to him as his petition would have this Honorable Court believe. Sherman was given such complete and unrestricted freedom over the premises that Kille abandoned any expectation of privacy. See *United States v. Mendozo*, 473 F.2d 692 (1973) at 696.

The Petitioner asserts that, "It is vital that this Court not permit constitutional rights to be determined on the outcome of the 'pitting' of the guileful and garrulous undercover agent against the gullible and unsuspecting home owner" (Br. 6). This Court has on a number of occasions concluded that the use of undercover agents is perfectly acceptable. In a series of cases in 1966, this Court addressed itself to the question of use of undercover agents, surveillances, and searches and seizures. *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 206 (1966); and to a lesser extent, *Osborn v. United States*, 385 U.S. 323 (1966). Chief among these cases in the instant circumstance is *Lewis v. United States, supra.* Petitioner seeks to distinguish *Lewis* on the grounds that this Court held that Lewis' Fourth Amendment right to resist an unlawful search was waived because he invited the police agent into his home to sell him marihuana and that consequently he turned his home into a commercial establishment for the purposes of selling marihuana and thereby waived his rights. Such a limitation of the *Lewis* decision is inconsistent with the theory behind the conclusion that the Court drew. In *Lewis*, the Court stated that there was clearly a necessity for undercover police activity and that the Government is, of course, entitled to use decoys and to conceal the

identity of its agents. *Lewis, supra,* at p. 209. While the Court in *Lewis,* under the facts in that case, did hold that the conversion of the home into a commercial center and the conduct of the petitioner's business therein waived his Fourth Amendment right, there is no logical distinction from the instant case. In *Lewis,* the Court said:

> "A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for that very purposes contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials; . . ." (Lewis at p. 211).

The Court went further and said:

> "Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional *per se.*" (Lewis at 210).

In quoting the Government's conclusion, it is significant to note that the posture of the cases relied upon by the State of Maryland is virtually the same as the posture in which the Government presented its case in *Lewis* in that it is contended by the Respondent that the Petitioner Kille did no less by way of invitation and subsequent revelation of his possession of marihuana to Sherman as Kille would have done to any other person which Baluta brought with him. In this context, perhaps most significant is the language relied on in *Lewis* taken from *United States v. King,* 472 F.2d 1.

> ". . . the risk of being betrayed by an informer is one of those risks that conspirators necessarily assume." *King* at 696.

Lastly, the use of undercover agents *per se* has been upheld in numerous occasions, see *United States v. White,* 401

U.S. 745; *United States v. King*, 472 F.2d 1; *United States v. Mendoza*, 473 F.2d 692 (5th Cir., 1972); and *United States v. Wilmonth*, 325 F. Supp. 1397 (D. Ct. Mass., 1971).

From these decisions it can be clearly distilled that this case is analogous to *Lewis* in that in *Lewis* the agent was voluntarily admitted for the purposes of the petitioner, and in this case, Trooper Sherman was voluntarily admitted for the purpose of the Petitioner Kille. Thus, the Petitioner in the instant case should not be allowed to rely upon his misplaced confidence in Sherman and thus avoid the consequences of his voluntary actions and his voluntary disclosures to Sherman. Because of the lack of inquiry into Sherman's background plus the lack of restrictions placed upon Sherman in the disclosure of possession of marihuana, the Petitioner cannot now expect to limit the use of the information freely given to Sherman on the grounds that he did not know who Sherman was for, as it has been stated before, it is a self-defeating argument. If Petitioner was concerned with what Sherman would do with the information, he should have made a more detailed examination as to who Sherman was or he should have withheld his invitation or his acquiescence to Sherman's presence at his home and should have also withheld the marihuana from Sherman. He did none of these, and thus, Sherman should be allowed to use that information freely for any purposes.

II.

THE EVIDENCE SEIZED SHOULD NOT HAVE BEEN SUPPRESSED BECAUSE OF THE FAILURE OF TROOPER SHERMAN TO APPRAISE THE PETITIONER OF THE REAL PURPOSE OF HIS VISIT AND TO ADVISE THE PETITIONER OF HIS RIGHTS UNDER THE FOURTH AMENDMENT TO REFUSE A WARRANTLESS SEARCH AND SEIZURE IN THE PETITIONER'S HOME.

The short answer to the Petitioner's question as to whether or not he should have been advised of his right under the Fourth Amendment to refuse a warrantless search and sei-

zure is, of course, that Kille had no such right. Initially, it can be said that the Petitioner does not have a right to refuse every warrantless search and seizure but only unreasonable searches and seizures, and, of course, if the search was not unreasonable then he would not have a right to refuse it. Thus, if Trooper Sherman is determined to have been lawfully on the premises, then there was no reasonable search and seizure which the Petitioner had a right to refuse. See Argument I, *supra*. In any event, this Court has specifically rejected the contention which the Petitioner asserts herein.

In *Schneckloth v. Bustamonte*, *supra*, this Court stated that:

> "One alternative that would go far towards proving that the subject of a search did know he had a right to refuse consent would be to advise him of that right before eliciting his consent. That, however, is a suggestion that has been almost universally repudiated by both federal and state courts, and, *we think, rightly so*. For it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning." (footnote in *Gorman v. United States*, 380 F.2d 158 (1st Cir.); *United States ex rel. Cole v. Mancusi*, 429 F.2d 61 (2nd Cir.); *United States ex rel. Harris v. Hendricks*, 423 F.2d 1096 (3rd Cir.); *United States v. Vickers*, 387 F.2d 703 (4th Cir.); *United States v. Goosbey*, 419 F.2d 818 (6th Cir.); *United States v. Noa*, 443 F.2d 144 (9th Cir.); *Leeper v. United States*, 446 F.2d 281 (10th Cir.); *People v. Roberts*, 55 Cal. Rptr. 62, et al., including *Morgan v. State*, 2 Md. App. 440, 234 A.2d 762.) *Schneckloth*, *supra*, at pp. 2049-2050.

Mr. Justice Stewart pointed out in *Schneckloth* that in the Court's prior decision in *Miranda v. Arizona*, *supra*, the Court refused to extend the need of a warning under Miranda to Fourth Amendment situations. Thus, the answer to this contention by the Petitioner has clearly been passed upon by

this Honorable Court and the issue should be disposed of in accordance with this Court's prior decisions and the great weight of authority which holds that a person need not be advised of his right to refuse a search and seizure before such search and seizure can be conducted.

CONCLUSION

For the aforegoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari to the Court of Special Appeals of Maryland should be denied.

Respectfully submitted,

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APPENDIX A

Unreported

In the Court of Special Appeals of Maryland

No. 755

September Term, 1972

Frederick Killie a/k/a Frederick Kille,

v.

State of Maryland.

Orth, C.J., Moylan, Menchine, JJ

Per Curiam

Filed: August 1, 1973

PER CURIAM:

Frederick Kille was convicted by a jury in the Circuit Court for Cecil County of possession of marihuana. He was sentenced to the Cecil County Jail for the term of ninety days.

His appeal contends that the trial court wrongfully refused to suppress evidence allegedly taken in violation of constitutional rights assured by the fourth amendment.

We rejected the precise contention in an earlier appeal. *Killie v. State*, 14 Md. App. 465 (reversed on other grounds) In that prior appeal we said at page 472:

> The appellant's first contention is that the State Trooper only gained the vantage point within the appellant's

home from which he could observe criminal activity and from which he could observe incriminating evidence by a subterfuge. He claims this to be a violation of the Fourth Amendment. He reads the Amendment overbroadly. Its office is to protect persons against unwarranted physical intrusions carried out against the will and without the consent of the victim. It is not intended to guard against the mistaken belief, howsoever produced, which leads an occupant to the imprudent issuing of invitations. *Lewis v. United States*, 385 U.S. 206, is completely dispositive of the appellant's contention in this regard. In *Lewis*, a government undercover agent assumed the role of a narcotics addict and, in that guise, was invited into Lewis's apartment for the purpose of purchasing narcotics. Incriminating evidence was discovered by the undercover agent, was seized and was introduced at Lewis's trial. Lewis claimed that the entry into his apartment by means of a stratagem constituted a violation of the Fourth Amendment. He found support only in the lone dissent of Justice Douglas.

The appellant here seeks to distinguish *Lewis* on the ground that the invitation in the case at bar was issued for social purposes and not for commercial purposes. The appellant may find moral comfort in the concurring opinion of Justices Brennan and Fortas which upheld the conviction in *Lewis* solely on the ground that the use of the apartment for commercial purposes operated to divest it of Fourth Amendment protection. The majority opinion of Chief Justice Warren, speaking for six members of the Court, on the other hand, offers the appellant no such refuge. The Court held squarely that a government agent, "in the same manner as a private person," may accept invitations and may enter upon premises "for the very purposes contemplated by the occupant." In commenting generally upon the need for undercover activity as an indispensable investigative technique, the Court said, at pp. 208-209:

> "His only contentions are that, in the absence of a warrant, any official intrusion upon the privacy of a home constitutes a Fourth Amendment violation

> and that the fact the suspect invited the intrusion cannot be held a waiver when the invitation was induced by fraud and deception.
>
> Both petitioner and the Government recognize the necessity for some undercover police activity and both concede that the particular circumstances of each case govern the admissibility of evidence obtained by stratagem or deception. Indeed, it has long been acknowledged by the decisions of this Court, . . . that, in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents."

Although additional testimony was taken on the motion to suppress at a second hearing, (with the transcript of the hearing on the earlier motion incorporated as an integral part of the second) the trial court found no basis for a change of his original position. He said in a memorandum opinion: "The additional testimony does not change the Court's finding of facts * * *. The Court remains convinced that Trooper Sherman entered the Defendant's home as an invitee and guest. His entry was lawful and for the reasons stated * * * and * * * the opinion of Judge Moylan, speaking for the Court of Special Appeals, * * * filed * * * on February 14, 1972, the subsequent arrest and search and seizure was lawful".

We find nothing in the additional testimony of the appellant or his witness Reach (separately charged and convicted of the same offense) that permits any other conclusion than that the appellant, either directly, or by necessary implication, invited Trooper Sherman into his home. Accordingly, we adhere fully to the previously quoted excerpts from our prior decision.

Two cases in the Supreme Court, while quite dissimilar factually, use language bringing the subject case into sharp focus. One — *Katz v. U. S.*, 389 U.S. 347, said at page 351:

"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." The second — *Hoffa v. U. S.*, 385 U.S. 293, said

at page 302: "The petitioner, in a word, was not relying on the security of the hotel room (home); he was relying upon his misplaced confidence that Partin (Sherman) would not reveal his wrongdoing." (Parenthetical insertions added.)

JUDGMENT AFFIRMED.
APPELLANT TO PAY THE COSTS.

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is:

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY,
Chief Judge.

Date: October 9, 1973.

APPENDIX C

In the Circuit Court for Cecil County

Criminal No. 2392
Criminal No. 2391

State of Maryland,

v.

Frederick Kille and Robert Ulmer Raech.

MEMORANDUM OPINION

The Defendants, Frederick Kille and Robert Ulmer Raech, each move to suppress as evidence in this case "all property, tangible objects, papers, and documents illegally and un-

lawfully taken from him on the grounds that said property was the production of an unlawful search and seizure."

To support its contention that the evidence sought to be suppressed was lawfully taken at the time of the arrest of the Defendants and should be admitted into evidence, the State produced as witnesses Trooper Robert D. Sherman of the Maryland State Police, who has had two years experience working in the narcotics section of the State Police and who has investigated well over 100 narcotic cases, most of them being marihuana cases, and Trooper Leon Ordway, also of the Maryland State Police, working out of the narcotics section.

Trooper Sherman testified that a complaint was received at the North East Police Barracks from a bartender by the name of George Baluta that the defendants frequented the bar where he worked and were involved with marihuana. Trooper Sherman and Trooper Ordway were assigned to make the investigation, and on September 17, 1970, Trooper Sherman visited the North East Police Barracks and received what information was available and further instructions. On September 19, 1970, he and Trooper Ordway, as undercover agents of the police, arrived in Elkton around 10:30 p.m. and Trooper Sherman went alone into the tavern where he recognized the bartender Baluta from the description given him. The bartender pointed out the defendant Kille. Trooper Sherman became involved in a conversation with Kille and asked if he might sit at his table and was told that he might do so. At the table were the two defendants and an unidentified subject. Trooper Sherman inquired as to where he might find some "action" in the Town and the Defendant Kille replied that he knew of no place in Town. Kille then invited the Trooper to visit his home. Not knowing where Kille lived, Baluta drove Sherman to Kille's house at Cherry Hill in Cecil County. Baluta and Sherman approached the front door of the house and Baluta knocked on the door; Kille came to the door and invited them in. They walked through the house to the kitchen. Upon entering the kitchen Sherman noticed that the room was filled with smoke and he detected an odor that he recognized as resulting from

smoking marihuana. He observed on the table in the kitchen two long stem pipes and a plastic bag containing a greenish-brown vegetable substance as well as an ashtray with residue in it. He and Baluta sat at the table with the defendants, Kille and Raech, whereupon Raech offered Sherman a cigarette. Sherman declined and then he was handed a pipe and he pretended to smoke it. He offered to return the pipe and the Defendant, Raech, told him to keep it, indicating that they had plenty to smoke. The defendant Kille confirmed this. Then Sherman gave a prearranged signal which was observed by Trooper Ordway who had arrived at the Kille house alone and who had remained on the outside of the dwelling. Thereupon Trooper Ordway entered the house through the front door and as he entered the kitchen, Trooper Sherman identified himself as a police officer, as did Trooper Ordway, and they then placed the defendants under arrest. Immediately thereafter Trooper Sherman took into custody the pipes, the ashtray, and the plastic bag containing a greenish-brown vegetable substance which were in full view upon the kitchen table. The police officers then looked through the cabinets and in the pantry or closet in the kitchen and recovered a homemade water pipe with water and residue, a blue Tupperware container with residue, one set of scales, an envelope containing pictures of defendant Kille and an electric bill addressed to Kille. There is a conflict in the testimony of the officers as to whether or not the defendants were advised of their Constitutional Miranda rights at anytime after the arrest. When the set of scales was recovered from the closet, the defendant Kille remarked to the officers that they belonged to the school, and there is some discrepancy between the officers as to Kille's statement as to the purpose for which he brought home the scales. Trooper Sherman indicated that he said he brought home the scales to weigh the substance in the plastic bag without mentioning it by name, while Trooper Ordway's recollection was that Kille's remark was to the effect that he brought the scales home to weigh the marihuana. Thereafter a uniformed police officer from the North East Barracks arrived and the defendants were taken to the Barracks in a police car.

The arrest of the Defendants were made without a warrant, and no search warrant was ever obtained for a search of any part of the house or of the Defendants.

The Defendants contend that all the articles seized and taken by the police officers from Defendant Kille's house and intended to be offered as evidence against the Defendants at their trial was the result of an illegal search and seizure and therefore should be suppressed.

In this case the Court finds that Trooper Sherman was an invitee to the Kille home into which he was voluntarily admitted by the Defendant Kille himself, and he was therefore in the house lawfully. Defendants contend that he obtained the invitation to the house by ruse or guileful means and that his sole purpose in going to the house was to obtain sufficient evidence upon which to make an arrest of the Defendants for the offenses upon which they were subsequently indicted, and that inasmuch as he had no search warrant or other warrants for their arrest, his entry into the house was unlawful.

Assuming such to be the case, the officer's entry into the house cannot be construed by any stretch of the imagination as having been made forcibly. The mere fact that Trooper Sherman may have hoped to find sufficient evidence upon which to affect an arrest of the Defendants when he was voluntarily admitted to the house pursuant to the invitation of the Defendant Kille does not without more constitute the officer a trespasser or an intruder.

Chief Judge Murphy, speaking for the court in Mullaney v. State, 5 Md. App. 246 at page 257 cited the Supreme Court case of Sabbath v. U. S., 391 U.S. 585, in which it was observed "that entry into private premises obtained by ruse has been viewed as not involving a 'breaking', the rule being entry gained by the use of deception for the purpose of affecting an arrest is constitutionally permissible so long as force is not applied."

The Court therefore concludes that Trooper Sherman was not in the Defendant Kille's house unlawfully. The Court further finds that Trooper Sherman, when he entered the

kitchen of the Defendant's house and observed that it was a smoke-filled and detected an odor which he recognized as that which results from the smoking of marihuana, and that he sees before him on the table two pipes and a plastic bag containing a greenish-brown vegetable substance which, in his opinion based on his expertise as a special investigator in the narcotics divsion of the State Police, he believes is marihuana, had probable cause to believe that a felony was committed or was being committed within his presence and based thereon to make an arrest without the necessity of first having obtained a warrant. As an incident to the arrest the officer could lawfully seize and take into custody those articles connected with offenses charged.

The Defendants also argued that it was violative of their rights under the 4th Amendment to the Constitution for the officer to seize the named articles without a search warrant first having been obtained. They say that the officer should have first obtained the search warrant, if they had probable cause, and then returned to the house to seize the articles that were in fact seized by the officers. If under the circumstances of this case this was required of the officers to make the arrest and seize the property connected with the offenses for which the Defendants have been charged, then there is a strong possibility that by the time they returned to the house not only the offenders, but the physical evidence, of the crimes would have disappeared. This happened at about midnight on a Saturday evening. It would have been extremely difficult, if not impossible, to have prepared the necessary affidavit and the search warrant itself, which in itself takes considerable time, and then find a magistrate or judge to issue the necessary warrants, all within such a reasonable time as to permit the officers to return to the house with any possible chance or likelihood of finding the Defendants and the physical evidence of the offenses still there. It would have amounted to an exercise in futility.

Furthermore, Article 27, Section 594B of the Annotated Code provides for situations in which a police officer may make an arrest without a warrant. It provides that he may arrest without a warrant when a felony is committed in his

presence or when he has probable cause to believe a felony is being committed in his presence or within his view. It further provides that a police officer may arrest a person without a warrant if he has probable cause to believe 1) that an offense listed in subsection (e) of this section, which includes specifically offenses relating to drugs and other dangerous substances as codified in Sections 276 through 313D of Article 27, has been committed, and 2) that the person has committed such an offense, and 3) that unless the person is immediately arrested (a) he may not be apprehended, or (b) he may cause injury to the person or damage to the property of one or more other persons, or (c) he may tamper with, dispose of, or destroy evidence.

Certainly in this case the police officer acted within the authority of Article 27, section 594B when he became aware, based on his personal observations, that there was probable cause to believe that a felony was being committed in his presence by the defendants and that unless the persons were immediately arrested they might tamper with, dispose of, or destroy the evidence. The offense for which the arrest was made falls directly under the provisions of subsection (e) governing the offenses set forth in Sections 276 through 313D of Article 27 of the Annotated Code relating to drugs and other dangerous substances. The arrest having been lawfully made, the police officers had a right to seize and take into custody such physical evidence as was within their sight, and had some relation to the crime for which they were charged. Therefore, the ashtray with residue, the two pipes, one a brown pipe with black stem containing greenish-brown vegetable substance and the other a corn cob pipe with residue, and a plastic bag containing a greenish-brown vegetable substance, being on the kitchen table in clear view of the officers are clearly admissible in evidence and the Defendants' motion to suppress such evidence will be denied.

As to the objects obtained upon a search of the closets and cabinets in the kitchen, and the articles taken from a stand in the hall leading to the kitchen, the Court concludes that these articles were not within the view of the police officers at the time of the arrest, and constituted no basis

for probable cause for the arrests. These items were not within the reach of the Defendants at the time of their arrest and were not likely to be tampered with, disposed of, or destroyed by them. Under the circumstances the search of the premises following the arrest and the seizure of these particular articles, namely, the blue Tupperware container with residue, the homemade water pipe, the set of grey scales, the pictures of the Defendant Kille, his mail and the electric bill addressed to him, was not made in accordance with the guidelines set out in the case of Chimel v. California, 395 U.S. 752, 23 L. Ed. 2d 685. The Court will therefore grant the motion to suppress these particular articles as evidence in the case.

The State has indicated that it intends to offer as evidence the statement made by the Defendant Kille following his arrest at the time when the scales were recovered from the cabinet. The Court finds that he was not advised of his Constitutional rights in accordance with the directions of the Miranda case. The statement therefore would not be admissible and the Court so holds.

Wherefore, the Court denies the motion of the Defendants, Frederick Kille and Robert Ulmer Raech, to suppress as evidence in the case against them the following articles seized at the time of their arrest on or about September 19, 1970, to wit: ashtray with residue; brown pipe with black stem containing greenish-brown vegetable substance; corn cob pipe with residue, and a plastic bag containing a greenish-brown vegetable substance.

The Court grants the motion of said Defendants to suppress all of the other objects so seized at the time of their arrest, exclusive of those aforementioned, and to return them to their rightful owners.

J. ALBERT RONEY, JR.,
Judge.

March 4, 1971.

APPENDIX D

MEMORANDUM OPINION

In the Circuit Court for Cecil County

Criminal No. 2392

State of Maryland
v.
Frederick Kille

The Defendant's motion to suppress is submitted to the Court upon the testimony heard by this Court on March 4, 1971, a transcript of which the Court has before it, plus the additional testimony of Robert Raech and the Defendant himself which was received on August 31, 1972, at a hearing on the Defendant's latest motion to suppress. The additional testimony does not change the Court's finding of facts as expressed in its Memorandum Opinion dated March 4, 1971. The Court remains convinced that Trooper Sherman entered the Defendant's home as an invitee and guest. His entry was lawful and for the reasons stated in said Memorandum Opinion and in the Opinion of Judge Moylan, speaking for the Court of Special Appeals, which was filed in this case on February 14, 1972, the subsequent arrest and search and seizure were lawful.*

The Court therefore denies the motion of the Defendant Kille to suppress as evidence in the case against him the following articles seized at the time of his arrest on or about September 19, 1970, to wit: ashtray with residue; brown pipe with black stem containing greenish-brown vegetable substance; corn cob pipe with residue; and a plastic bag containing a greenish-brown vegetable substance.

J. ALBERT RONEY, JR.,
Judge.

September 1, 1972.

* 14 Md. App. 465 (1972).